

The Legacy of *Feist*: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods

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I. INTRODUCTION

This Article evaluates the ultimate effect of the Supreme Court's recent attempt to clarify a previously ambiguous area of copyright law. In *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,¹ the Court decided that copyright law did not protect the white pages listings of a telephone book. Although the layperson might not care about whether telephone companies "owned" the phone book, copyright lawyers recognized *Feist* as the Court's first attempt to bring order to a very confused and increasingly important area of copyright law, the application of copyright to factual compilations.²

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¹ 111 S. Ct. 1282 (1991).

² The number of articles which have been written on the subject reflects the confusion endemic to this area of copyright. See, e.g., Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990); Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981); Patry, *Copyright in Collections of Facts: A Reply*, 6 COMM. & THE LAW 11 (1984); Jones, *Factual Compilations and the Second Circuit*, 52 BROOKLYN L. REV. 679 (1986); Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569 (1963); Haungs, *Copyright of Factual Compilations: Public Policy and the First Amendment*, 23 COLUM. J.L. & SOC. PROBS. 345 (1990); Note, *Copyrighted Compilations of Public Domain Facts in a Directory: The Criterion of Infringement*, 71 NW. U.L. REV. 833 (1977); Note, *Copyright and Computer Databases: Is Traditional Compilation Law Adequate?*, 65 TEX. L. REV. 993 (1987).

The importance of this topic stems from a national economy which depends on the production and dissemination of information. See INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 9-11 (1987). According to one estimate, the information sector of the economy is now larger than the agricultural and industrial sectors combined. W. DIZARD, *THE COMING INFORMATION AGE: AN OVERVIEW OF TECHNOLOGY, ECONOMICS, AND POLITICS* 106 (1989). Equally astounding is the recent

Before *Feist*, a majority of courts extended protection only to the creative aspects of factual compilations.³ Under the "creative selection approach," copyright existed only if a given compilation exhibited a minimal amount of creativity in its selection and arrangement of facts.⁴ Since some compilations were no more than the mechanical listing of facts, they received no protection at all even though the compiler expended a substantial amount of effort to collect a large number of facts.⁵ Even if copyright existed, the facts themselves remained in the public domain and could be copied from the copyrighted work at will.⁶ In short, the creative selection approach guaranteed to future compilers the ability to base their works on any prior factual compilation so long as they did not borrow any original selection and arrangement.⁷ Consequently, subsequent producers of competing works enjoyed a competitive advantage over original producers by reason of not having to discover or otherwise gather the facts at all.

Other courts, however, took a very different view. Instead of protecting the creativity found in factual compilations, these courts protected the labor expended by the compiler in gathering the facts presented.⁸ Thus, under the "sweat theory," they granted full copyright protection as long as the compilation was the product of meaningful effort.⁹ This meant that all factual compilations which contained a significant number of facts received broad

growth of electronic information transfer. In 1986, the entire optical storage market was estimated at around \$200 million. During the 1990s that market will grow between \$2.5 to \$4.5 billion. Sehr, *High Noon for CD-Rom*, DATAMATION, Nov. 1986 at 80. By 1982, the on line information business had already reached \$1.5 billion, and has undoubtedly grown since then. J. NAISBITT, MEGATRENDS 25 (1982). If one proceeds on the assumption that copyright affects the health of these markets, confusion over copyright in works of information extracts a heavy price.

³ This approach was taken by the Second, Fifth, Ninth and Eleventh Circuit courts. *Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981); *Worth v. Selchow & Righter Co.*, 827 F.2d 569 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Southwestern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801 (11th Cir. 1985).

⁴ See *Eckes*, 736 F.2d 859 (2d Cir. 1984). See also *infra* notes 16-49 and accompanying text.

⁵ See *Financial Information, Inc. v. Moody's Investors Serv., Inc.*, 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987).

⁶ See *Worth*, 827 F.2d 569 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

⁷ See *Triangle Publications, Inc. v. Sports Eye, Inc.*, 415 F. Supp. 682 (E.D. Pa. 1976).

⁸ Courts taking this approach included the Seventh, Eighth and Tenth Circuits Courts. See *Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990); *Hutchinson Tel. Co. v. Frontier Directory Co.*, 770 F.2d 128 (8th Cir. 1985); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 916 F.2d 718 (1990), *rev'd*, 111 S. Ct. 1282 (1991).

⁹ See *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. 1977) (only 'industrious collection,' not originality, required to sustain copyright in directory of gardening services).

copyright protection, no matter how mechanical the selection or presentation. Courts applying this theory expressly prohibited others from copying even the facts from copyrighted compilations. Producers of competing works, therefore, had to proceed as if the original work had never existed.¹⁰ This rule eliminated the competitive advantage the producers of competing works had under the creative selection theory.

In *Feist*, a unanimous Supreme Court¹¹ resolved the above described conflict by using the creative selection approach to deny copyright protection to the white pages.¹² On its face, this choice clarified the law because it eliminated the sweat theory as a valid method of applying copyright to factual compilations. Such doctrinal clarification, however, does not necessarily mean that copyright's treatment of of factual compilations will become stable or predictable. This is because courts will probably apply *Feist* in two different, and possibly divergent, ways.

In some cases, a straightforward, quasi-esthetic determination about a compilation's creativity will resolve questions of copyrightability. Courts will simply decide whether a given compilation exhibits enough creativity to warrant copyright.

In other cases, copyright policy, and not esthetics, will be the determining factor. This will occur because decisions about creativity come perilously close to matters of taste, and not judgment. Each judge knows that his or her conception of creativity may not be shared by anyone else. Furthermore, even if his or her notions of creativity are "correct," each judge fears that the unguided nature of quasi-esthetic determinations risks an incoherent pattern of decisions.¹³ Courts confronted with this dilemma will understandably scrutinize

¹⁰ See *United Tel. Co. of Missouri v. Johnson Publishing Co.*, 671 F. Supp. 1514, 1522 (W.D. Mo. 1987), *aff'd*, 855 F.2d 604 (8th Cir. 1988) (second compiler cannot begin with plaintiff's copyrighted work).

¹¹ Eight justices joined Justice O'Connor's opinion. Justice Blackmun concurred in the result, without filing a separate opinion.

¹² The reader should be reminded of the distinction between the existence of copyright protection and copyright infringement. This Article focuses on the issue of whether copyright protects factual compilations. It does not address related issues of infringement because the *Feist* Court based its opinion on a denial of copyright, and not on an interpretation of infringement. See *infra* notes 90-99 and accompanying text.

¹³ The Supreme Court has already expressed discomfort with determinations about creativity in the context of copyright. See *infra* note 41 and accompanying text. Perhaps more striking is the Court's struggle to apply the somewhat analogous requirement that obscene works must, taken as a whole, lack "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). In response to the discomfort caused by earlier versions of the requirement, Justice Stewart wrote:

It is possible to read the Court's opinion *Roth v. United States* and *Alberts v. California* in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have

Feist for values to guide their judgments about creativity.¹⁴ They will find that the Court preferred the creative selection approach to the sweat theory because, according to the Court, the creative selection approach implemented basic copyright policy—the promotion of “the progress of Science and useful Arts.”¹⁵ In turn, courts interpreting *Feist* will use this policy as a guide for

reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it; and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring) (footnotes omitted).

¹⁴ The use of social policy to guide and justify doctrine has assumed an increasingly prominent role in modern judicial reasoning. This development has resulted from the discomfort associated with the modern realization that, contrary to our fervent desires, legal doctrines frequently offer no solid guidance for deciding cases. Sometimes doctrines conflict. Perhaps the only existing rule is vague. Even worse, there may be no applicable doctrine. When this happens, courts must base their decisions on something other than doctrine. See H.L.A. HART, *THE CONCEPT OF LAW*, Ch. 7 (1961); R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, Ch. 4 (1977); Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178 (1984). If courts fail to take such actions, their decisions will appear arbitrary, and critics will attack the court for acting injudiciously. See R. BORK, *THE TEMPTING OF AMERICA* 119–20 (1990); Lyons, *supra* at 185; Sartorius, *The Justification of the Judicial Decision*, 78 ETHICS 171 (1968).

¹⁵ *Feist*, 111 S. Ct. at 1290. The Court characterized the *Feist* result as “the essence of copyright,” and stated that “the primary objective of copyright is . . . ‘[t]o promote the Progress of Science and useful Arts.’” *Id.* at 1289–90 (quoting U.S. CONST. art. I, § 8, cl. 8). This language directly links the Court's decision to a long tradition which holds that copyright exists solely to provide economic incentives for the production of socially beneficial works. To put it somewhat differently, copyright should protect a work only if the work is deemed socially beneficial and its creation would be jeopardized without the financial incentives provided by copyright. Building on this tradition, copyright should be shaped to maximize the amount by which the public benefit gained from increased production of useful works exceeds the associated costs. See H. Rep. No. 2222, 60th Cong., 2d Sess.:

Not primarily for the benefit of the author, but primarily for the benefit of the public, [copyright] rights are given In enacting a copyright law Congress must consider . . . two questions: first, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

See also *Mazer v. Stein*, 347 U.S. 201, 219 (1954), *reh'g denied*, 347 U.S. 949 (1954): “The economic philosophy behind the clause empowering congress to grant patents and

applying the creative selection approach. If the creativity of a given compilation is unclear, the question will be resolved by asking whether a finding of creativity (*i.e.*, an extension of copyright protection) would actually advance "the progress of Science and useful Arts."

Upon first inspection, this simultaneous use of policy and doctrine would seem to lead copyright towards stability and predictability. Courts should find

copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." *See also* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984), *reh'g denied*, 465 U.S. 1112 (1984):

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

For articles taking a similar view, see Landes & Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325 (1989); Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045 (1989); Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Hurt & Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 420 (1966). Finally, a recent treatise by a leading copyright scholar has taken economics as the primary framework on which to base its analysis. P. GODLSTEIN, *COPYRIGHT: PRINCIPLES, LAW & PRACTICE* (1989).

This loud chorus should not, however, be taken as proof of the proposition that copyright is always best explained or shaped as a matter of economic incentives. Indeed, many recent articles either express significant dissatisfaction with the overwhelming emphasis on economics in copyright or explain copyright in noneconomic terms. *See* Jaszi, *Towards a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) (arguing that so-called "encouragement theory" provides inadequate basis for copyright); Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990) (pointing out indeterminacy of economic principles and apparent presence of natural law reasoning in copyright); Litman, *The Public Domain*, 39 EMORY L.J. 965, 997-98 (1990) (criticizing "unruly brawl" among economists analyzing copyright); Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (basing explanation on philosophies of Locke and Hegel); Kauffman, *Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents*, 10 COLUM. J.L. & ARTS 381 (1986) (contending that natural rights is the basis for copyright).

The conclusion to be drawn from the noneconomic copyright movement is that a diverse and sometimes conflicting set of values lies behind the phenomenon of copyright, and that a broadened perspective on the subject would be beneficial. *See* Yen, *supra*, at 559 (advocating use of economics and natural law to study copyright); Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579 (1985) (advocating the combination of economic and authors' rights approaches).

that policy clarifies and informs doctrinal judgment by giving meaning to ambiguous concepts like creativity. If courts have a general sense of what they are trying to accomplish, it may well be easier for them to develop a consistent method of making decisions. This should result in a reasonably clear and stable line which separates copyrightable from uncopyrightable compilations.

Further consideration reveals, however, that this felicitous result will occur only if the suggested policy reasonably describes the effect of extending copyright to factual compilations on the basis of their creativity. If this is the case, decisions based on policy and decisions based on doctrine will be generally consistent, thereby reinforcing one another. By contrast, if extending copyright to creative compilations has little to do with "the progress of Science and useful Arts," a different outcome will follow. As an initial matter, courts would find that the protection of certain creative compilations actually harms "the progress of Science and useful Arts." Judges would then be forced into one of two difficult choices. They could follow the creative selection approach while knowingly disserving adopted policy. Alternatively, they could implement the desired policy while ignoring the results required by the creative selection approach. Either action would certainly create ambiguity in the law. If different courts were to follow each option, the confusion over how copyright treats factual compilations would become even worse. Irreconcilable conflicts would certainly ensue.

The foregoing discussion implies that an understanding of *Feist*'s ultimate effect on copyright begins with an analysis of whether its application of the creative selection approach to factual compilations reasonably promotes "the progress of Science and useful Arts." This Article provides such an analysis in three steps. First the background against which *Feist* was decided is set by describing the relevant copyright concepts and their application to factual compilations. Second, the *Feist* decision is summarized. Third, economics is used to describe how copyright promotes "the progress of Science and useful Arts" and then, the insights developed are used to evaluate the creative selection approach. This Article shows that copyright makes sense when it is used to help compilers overcome market conditions which prevent the recovery of compilers' development costs, and that copyright does not promote its stated policy when those costs are easily recovered or absorbed by non-profit organizations or government. The creative selection approach is then scrutinized to see if it extends copyright in a manner generally consistent with these observations. The Article shows that the creative selection approach does not do this, and it concludes with some suggestions for how to interpret *Feist* in light of the inconsistency between copyright doctrine and policy.

II. THE BACKGROUND OF *FEIST*

A quick look at the copyright code reveals no obvious problems with the treatment of factual compilations. Section 102(a) extends protection to "original works of authorship,"¹⁶ and section 103 specifically mentions compilations as copyrightable subject matter.¹⁷ The trouble begins when one discovers that Congress specifically adopted, without change, the definition for copyrightable subject matter established under the prior copyright statute.¹⁸ That statute extended copyright to "all writings of an author."¹⁹ That phrase, in turn, referred to language in article I of the Constitution which authorizes Congress to secure to "*authors* . . . the exclusive rights to their respective *writings*."²⁰ Thus, the proper construction of "original works of authorship" depends on prior judicial interpretation of constitutional language.

Although the constitutional authorization for copyright legislation refers only to "writings," courts have not limited the scope of copyright to strictly written matter. This tradition began in the seminal case of *Burrow-Giles Lithographic Co. v. Sarony*.²¹ In that case, the plaintiff sued the defendant for reproducing a photograph of Oscar Wilde taken by the plaintiff.²² The defendant admitted copying, but contended that the plaintiff's photograph was merely the "reproduction on paper of the exact features of some natural object . . . or person" ²³ It was argued that the photograph, therefore, was not a "writing" and could not be considered copyrightable subject matter.²⁴

The Court rejected this argument. Initially, the Court justified the broad construction of the constitutional term "writings" by noting that the first federal copyright statute protected maps, charts and books. Since this list included items which were not literally writings, and since the drafters of the statute included framers of the Constitution, the Court concluded that the framers intended a nonliteral interpretation of "writings."²⁵ The Court stated that

¹⁶ 17 U.S.C. § 102 (1991).

¹⁷ 17 U.S.C. § 103(a) (1991) ("The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

¹⁸ H.R. 94-1476, 94th Cong., 2d Sess. 51 ("The phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change the standard of originality established under the present copyright statute.").

¹⁹ 17 U.S.C. § 4 (1909).

²⁰ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

²¹ 111 U.S. 53 (1884).

²² *Id.* at 53.

²³ *Id.* at 56.

²⁴ *Id.*

²⁵ *Id.* at 56-57.

"authors" were those "to whom anything owed its origin," and that "[b]y writings in that clause is meant the literary productions of those authors" ²⁶

Having established the broad constitutional scope of copyrightable subject matter, the *Sarony* court then considered the defendant's contention that the plaintiff's photograph was merely a reproduction of pre-existing objects and, therefore, could not owe its origin to the plaintiff. Although this argument was plausible for "the ordinary production of a photograph," ²⁷ the Court found that the plaintiff's photograph was special because it arose

entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit. ²⁸

Because of this original selection and arrangement, the Court found the plaintiff's photograph copyrightable. ²⁹

For purposes of this Article, *Sarony* carries two important messages. First, the Court held that copyrightable subject matter had to "owe its origin" to an identifiable author. ³⁰ By implication, items which already exist at the time of alleged authorship could never become copyrighted property because a putative author could not claim credit for their creation. Second, despite this conclusion, the Court further held that the selection and arrangement of pre-existing items could constitute copyrightable subject matter if the selection or arrangement were the "original" product of an individual's mental conception. Thus, the *Sarony* plaintiff successfully claimed protection for his selection and arrangement of the unowned objects portrayed in the photograph. ³¹

Once the *Sarony* Court established "originality" as a prerequisite for copyright protection, lower courts assumed the task of separating original from unoriginal works. They did this by equating original works with works which displayed artistic merit. For example, in *J.L. Mott Iron Works v. Clow*, ³² the plaintiff claimed that the defendant had committed copyright infringement by

²⁶ *Id.* at 58.

²⁷ *Id.* at 59.

²⁸ *Id.* at 55.

²⁹ *Id.* at 60.

³⁰ *Id.* at 58.

³¹ *Id.* at 59.

³² 82 F. 316 (7th Cir. 1897).

copying designs from the plaintiff's price catalog.³³ In sustaining the lower court's dismissal of the complaint, the court held that a work could not be found copyrightable unless it had "some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."³⁴ Since the plaintiff's work was merely a catalog which advertised the plaintiff's wares, it did not satisfy this requirement.³⁵

Although they might seem strange to our modern sensibilities, decisions like *Mott* were perfectly consistent with the *Sarony* court's language. Among other things, the *Sarony* Court noted that the "ordinary production of a photograph" might not be copyrightable.³⁶ This statement could easily be seen as a directive to separate ordinary works from the genuinely creative ones. Of course, such an approach would leave many works unprotected, perhaps because a judge or jury would fail to see their artistic merit. Nineteen years after *Sarony*, this problem caused the Supreme Court to remove largely, but not completely, artistic merit as a prerequisite to copyright.

In *Bleistein v. Donaldson Lithographing Co.*,³⁷ the Court considered a claim brought by a circus owner against a defendant who had copied posters used to advertise the plaintiff's circus.³⁸ Although such a claim would seem open and shut under modern copyright law, both the trial court and the court of appeals had rejected the plaintiff's claim on the ground that advertisements could not possess the requisite artistic merit to become copyrightable subject matter.³⁹ In reversing, the Court specifically stated that the copyright act did not exclude works not associated with "fine art" from protection, and that "ordinary works" were fully protected.⁴⁰ This ruling was necessary because, according to the Court, judges should rarely, if ever, deny copyright to a work because of a perceived lack of artistic merit. Instead, the courts should liberally extend copyright to all works of commercial value or public interest.⁴¹

³³ *Id.* at 316.

³⁴ *Id.* at 318, 321 (quoting *Higgins v. Keuffel*, 140 U.S. 428, 431 (1891)).

³⁵ *Id.* at 318-19. *See also* *Higgins v. Keuffel*, 140 U.S. 428 (1891); *Falk v. Donaldson*, 57 F. 32, 34 (C.C.S.D.N.Y. 1893).

³⁶ *Sarony*, 111 U.S. at 59.

³⁷ 188 U.S. 239 (1903).

³⁸ *Id.* at 248.

³⁹ *Id.* at 248. *See also* *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993 (6th Cir. 1900).

⁴⁰ 188 U.S. at 250.

⁴¹ The Court's language is instructive:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation At the other end, copyright could be denied to pictures which

Together, *Bleistein* and *Sarony* established the law which governs copyrightable subject matter today. If a work exhibits minimally creative selection and arrangement, copyright protects it. Denial of copyright has, therefore, become exceedingly rare. In general, these standards have not been considered controversial. Few would dispute that the vast majority of nonfactual written, pictorial and audio works deserve copyright.⁴² When applied to factual compilations, however, the standards have spawned controversy.

Under the principle that no one can claim copyright in items already in existence at the time of writing, facts themselves cannot be copyrighted.⁴³ From this it is generally held that the simple listing of a fact cannot support copyright for two reasons. First, the listing is insufficiently creative to pass even the low *Bleistein* standard. Second, extension of copyright would unnecessarily risk a monopoly over the reported fact.

appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. . . . That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff's rights.

Id. at 251-52.

⁴² For an argument that copyright should not exist at all, see Palmer, *Intellectual Property: A Non-Posnerian Law & Economics Approach*, 12 HAMLINE L. REV. 261, 304 (1989) (criticizing patents and copyrights as "unjustifiable interventions into voluntary market processes").

⁴³ *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 111 S.Ct. at 1287; *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981) ("Obviously, a fact does not originate with the author of a book describing the fact. Neither does it originate with the one who 'discovers' the fact."). This conclusion is reflected in 17 U.S.C. § 102(b) which denies copyright to any discovery, "regardless of the form in which it is described, explained, illustrated or embodied in such work." Section 102 reflects congressional adoption of prior law developed by courts construing the prior copyright statute. H.R. 94-1476, 94th Cong., 2d Sess. 57 ("Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law."). See also *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) ("No author may copyright his ideas or the facts he narrates 'The news element the information respecting current events contained in the literary production is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*'" (citations omitted)).

Acceptance of this result should be tempered, for it rests on what some have called "the Platonic fact precept." Those skeptical of the result have pointed out that facts do not exist independently of individual perception. Thus, it is arguably impossible to separate the fact from a subjective, and therefore original, presentation. See Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after Hoehling v. Universal City Studios*, 29 BULL. COPYRIGHT SOC'Y U.S.A. 647, 658 (1982); Litman, *supra* note 15, at 996.

For example, if the dean's office telephone extension is 4340, a directory listing "Law School Dean-4340" can hardly be considered original. Since the listing is the mechanical report of a pre-existing fact, writing the words "Law School Dean-4340" requires so little creativity that it falls outside the "narrowest and most obvious limits" suggested by *Bleistein*.⁴⁴ Moreover, even if one decided that the listing was sufficiently creative, copyright in the listing could easily develop into copyright in the underlying fact. This would happen because there are very few reasonably different ways of conveying the information contained in the listing. An enterprising individual would simply obtain copyrights on those few listings and then claim that anyone who reported the relevant information in the future had violated her copyright. This would effectively prevent others from borrowing the uncopyrightable underlying fact and re-reporting it to the public.⁴⁵

Of course, if one decides that a report of a single fact is not copyrightable, then how can a list of numerous facts be copyrightable, as suggested by section 103 of the copyright code? After all, if the mechanical reporting of one fact is not copyrightable, how does repeating the act many times change the result?⁴⁶ Courts have responded to this challenge in two separate ways, each of which has its benefits and drawbacks.

The most common response to this challenge extends the concepts of *Sarony* and *Bleistein* to fit factual compilations. The *Sarony* Court decided for the plaintiff because the plaintiff's work included the independent selection and arrangement of various pre-existing objects. The esthetic nature of the result convinced the Court that the photograph merited copyright.⁴⁷ This reasoning suggests an argument which leads to the copyrightability of factual

⁴⁴ Denicola, *supra* note 2, at 525.

⁴⁵ This reasoning reflects the well established copyright principle that when an idea or fact can be expressed in only a few ways, copyright will be denied to what would otherwise be copyrightable expression. *See Hodge E. Mason v. Montgomery Data, Inc.*, 765 F. Supp. 353 (S.D. Tex. 1991) (Correct legal descriptions and other factual information merge with expressions possible in plaintiff's map. Copyright, therefore, denied.); *Cooling Sys. and Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485 (9th Cir. 1985) (applying merger doctrine to plaintiff's catalog of replacement radiators); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984) (methods of playing Scrabble capable of so few expressions that paraphrasing of book excused); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967) (contest rules capable of so few expressions that copyright in rules must be denied); *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958), *cert. denied*, 358 U.S. 816 (1958) (particular type of insurance could only be expressed in so few ways that plaintiff had to be enjoined from claiming infringement of insurance forms); *M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT*, at § 13.03[B][3] (1991).

⁴⁶ *Cf.* Denicola, *supra* note 2, at 527.

⁴⁷ *Sarony*, 111 U.S. at 60 (characterizing plaintiff's photograph as "useful, new, harmonious, characteristic and graceful").

compilations. While it is true that the reporting of a single fact does not involve creativity sufficient to support copyright, the reporting of many facts involves independent selection and arrangement not unlike that discussed in *Sarony*. For example, the photographer's selection of what objects to portray corresponds to decisions made by the producer of a compilation about which facts to list. Similarly, the photographer's choice of where to place each object in the frame may be analogized to decisions the compiler must make to arrange her selected facts so as to render them accessible to the intended user.

Of course, one might still object on the grounds that the compiler's selection and arrangement do not lead to the esthetic results which convinced the *Sarony* Court to award copyright. *Bleistein*, however, greatly reduced the creativity requirement of *Sarony*. Indeed, according to *Bleistein*, a work arguably demonstrates the necessary merit as long as someone wants to copy it.⁴⁸ Thus, one can very plausibly maintain that compilations of fact are copyrightable, as long as they exhibit creativity which passes the minimal requirement of *Bleistein*. Under this view, most compilations are copyrightable.⁴⁹

If one accepts the foregoing, it might seem that the conflict addressed by *Feist* should never have occurred because all questions about the copyright treatment of factual compilations may be answered by applying *Sarony* and *Bleistein*. A closer look, however, reveals that this approach, which this Article will refer to as "the creative selection approach," leads to results that many find counterintuitive.

Consider the logical implications of extending copyright only to the selection and arrangement of facts in a compilation. If this is the case, then a second author should be able to borrow information from a compilation liberally, as long as she rearranges or reselects the facts presented. For example, in *Worth v. Selchow & Righter Co.*,⁵⁰ the plaintiff held copyright in two books on trivia that he had authored.⁵¹ Each book contained alphabetical listings of about 6,000 items of trivia.⁵² The plaintiff accused the defendants, who had designed the game Trivial Pursuit, of infringing his copyright by basing the game's questions on his books.⁵³ Although the defendants admitted

⁴⁸ See *supra* note 41.

⁴⁹ *Feist*, 111 S. Ct. at 1287 ("[C]ompilations of fact generally are [copyrightable]."). Compare *Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984) (listing of baseball card prices exhibits creativity sufficient to support copyright) with *Financial Information, Inc. v. Moody's Investors Serv.*, 80 F.2d 204 (2d Cir. 1986), *cert. denied*, 108 S. Ct. 79 (1987) (plaintiff's "daily bond cards" do not exhibit creativity sufficient to support copyright).

⁵⁰ 827 F.2d 569 (9th Cir. 1987).

⁵¹ *Id.* at 570.

⁵² *Id.*

⁵³ *Id.*

consulting the plaintiff's books, the district court granted summary judgment for the defendants.⁵⁴ In affirming, the Ninth Circuit noted that taking facts from the plaintiff's works was perfectly permissible, and that infringement could not occur unless the defendants borrowed the plaintiff's selection and arrangement of the facts. Since the Trivial Pursuit game randomly placed the borrowed facts on cards, no copying of the plaintiff's alphabetical ordering occurred. Moreover, since the game contained facts not listed by the plaintiff, selection had not been taken either. Under the creative selection approach, the defendants had to prevail.⁵⁵

Brief reflection reveals why this result proves troubling to so many. According to cases like *Worth*, the creative selection approach allows others to appropriate, without charge, the information found in any compilation, even if the borrower immediately puts that information into a competing work.⁵⁶ To the extent that the compiler labored to produce her work, it may not seem fair to allow others to profit from that labor without paying compensation. Moreover, the permissive attitude toward borrowing taken by the creative selection approach would seem to undermine the incentives for creation of useful works that copyright supposedly provides. If others could appropriate the fruits of compilers' labor without paying compensation, then no one would be willing to produce the desired factual compilations, and society's welfare would suffer.

These arguments carry considerable appeal. It should, therefore, come as no surprise that many post-*Sarony* courts managed to reach results contrary to that suggested by the creative selection approach. In some opinions, courts

⁵⁴ *Id.*

⁵⁵ *Id.* at 573. See also *J.R. O'Dwyer Co., v. Media Mktg. Int'l, Inc.*, 755 F. Supp. 599 (S.D.N.Y. 1991); *Black's Guide, Inc. v. Mediamerica, Inc.*, Copyright L. Dec. (CCH) ¶ 26,621 (N.D. Cal. 1990) (LEXIS, Genfed library, Dist. file, No. 16272); *Triangle Publications, Inc. v. Sports Eye, Inc.*, 415 F. Supp. 682 (E.D. Pa. 1976). Cases such as the foregoing should be distinguished from other cases which extend broad copyright protection on spurious findings of selection and arrangement. See *infra* note 57 and accompanying text.

⁵⁶ See *Triangle Publications, Inc. v. Sports Eye, Inc.*, 415 F. Supp. 682, 685-86 (E.D. Pa. 1976):

Plaintiff's real complaint . . . is defendant's use of [the plaintiff's work], without significant cost, to prepare its own publication a publication which then competes in the marketplace with plaintiff's paper. But, the answer is . . . that it is only the method or form for expressing the data that is copyrightable.

See also *Black's Guide, Inc. v. Mediamerica, Inc.*, Copyright L. Dec. (CCH) ¶ 26,621 (N.D. Cal. 1990) (LEXIS, Genfed library, Dist. file, No. 16272) (court expresses some regret, but refuses to find infringement even if the defendant had copied information from the plaintiff's work to produce a competing directory). For a different view, see *infra* note 69 and accompanying text.

simply tortured the meaning of "originality" and "creativity" to make dubious findings about the existence or appropriation of creative selection.⁵⁷ In other cases, courts relied on theories which permitted the direct protection of the labor invested by a compiler in his work.⁵⁸

At the outset of this trend, it appears that courts applying this "sweat theory" did not even see a conflict between their decisions and *Sarony* and *Bleistein*.⁵⁹ After all, pre-*Sarony* courts had long protected compilations on the basis of an author's labor,⁶⁰ and neither *Sarony* nor *Bleistein* explicitly

⁵⁷ See, e.g., *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987) (finding creative selection in West's ordering of cases and pagination in case reporters); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985) (finding creative selection in listing and alphabetical ordering of white pages); *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986) (defendant infringed plaintiff's map despite different presentation of data). See also Ginsburg, *supra* note 2, at 1894 ("[M]any courts will strain to find (or will simply declare the existence of) 'selection and arrangement' in such patently nonselective and un-'arranged' compilations as, for example, geographically determined alphabetical address directories.").

⁵⁸ Perhaps the most widely quoted statement in support of protecting compilers' labor comes from *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1922). In *Jeweler's Circular*, the Second Circuit found a directory of trade symbols copyrightable. In so holding, the court wrote:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.

Id. at 86. This statement was explicitly criticized by the *Feist* Court as an illegitimate statement of the sweat theory. 111 S. Ct. at 1295.

⁵⁹ For example, in *Leon v. Pacific Tel. & Tel.*, 91 F. 484 (9th Cir. 1937), the Ninth Circuit simultaneously cited *Bleistein* and *Jeweler's Circular*. In *Leon*, the defendant borrowed the information in the plaintiff's telephone directory. However, instead of reproducing the plaintiff's alphabetical ordering of names with telephone numbers, the defendant classified its listings by ascending telephone number with accompanying names. *Leon*, 91 F. at 485. *Leon* is clearly a sweat theory case because it found infringement even though the defendant used its own selection and arrangement of data.

⁶⁰ For a pre-*Sarony* statement about copyright's protection of labor, see E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 386 (1879): "[It is] a fundamental principle of the law of copyright . . . that a work, to be free from piracy, must be the result of the author's 'own labor, skill, and use of common materials and common sources of knowledge open to all

terminated that practice.⁶¹ Later on, however, when the implications of the creative selection approach became clear, these courts articulated their dissatisfaction with creative selection results and stated a preference for the sweat theory.

Perhaps the most articulate example of this position is *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*⁶² In that case, the plaintiff, National Business Lists, sued Dun & Bradstreet for attempts to monopolize the market for mailing lists. Dun & Bradstreet counterclaimed, alleging among other things that mailing lists sold by National Business Lists infringed copyrights in numerous credit reference books published by Dun & Bradstreet.⁶³ In an opinion which considered only the intellectual property claim, the court noted that Dun & Bradstreet had published its works for many years. They contained large amounts of information about various businesses, including their names and addresses.⁶⁴ Dun & Bradstreet claimed that National Business Lists committed copyright infringement when it based its mailing lists on the Dun & Bradstreet works.⁶⁵

For purposes of this Article, the interesting point about *National Business Lists* is that the counterdefendant did not copy Dun & Bradstreet's works wholesale. Instead, National Business Lists merely extracted the names and addresses found in Dun & Bradstreet's work and formed mailing lists with that information. These lists were then checked against telephone directories and augmented with names and addresses not found in Dun & Bradstreet's works.⁶⁶

Under the creative selection approach, Dun & Bradstreet had a poor copyright claim. Since National Business Lists augmented and changed the information presented, neither its selection nor arrangement could be considered borrowed from Dun & Bradstreet.⁶⁷ Nevertheless, the court found in favor of Dun & Bradstreet. In a laudably candid opinion, the court expressed dissatisfaction with results reached under the creative selection approach. The court then followed the line of cases which extended protection not to the

men.” (quoting *Emerson v. Davies*, 8 F. Cas. 615, 624 C.C.D. Mass. 1845) (No. 4436) (Story, J.). The long existence of this view is discussed at length in Ginsburg, *supra* note 2, at 1875-81.

⁶¹ As the reader will recall, *Sarony* upheld a plaintiff's attempt to expand the scope of copyrightable subject matter. See *supra* notes 21-29 and accompanying text. Moreover, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), explicitly mentioned the copyrightability of directories. *Id.* at 250 (“The least pretentious picture has more originality in it than directories and the like, which may be copyrighted.”).

⁶² 552 F. Supp. 89 (N.D. Ill. 1982).

⁶³ *Id.* at 90.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 91.

⁶⁷ See *supra* notes 50-55 and accompanying text.

creative aspects of Dun & Bradstreet's compilation, but to the very labor of collection. The court wrote:

Compilations such as D&B's have value because the compiler has collected data which otherwise would not be available. The compiler's contribution to knowledge normally is the collection of the information, not its arrangement. If his protection is limited solely to the form of expression, the economic incentives underlying the copyright laws are largely swept away. Recognizing this, the courts have long afforded protection under the copyright law against appropriation of the fruits of the compiler's industry.

That protection does not fit nicely into the conceptual framework of copyright law and for that reason has been criticized The courts have generally rested, however, not on an analysis of copyright concepts but on the economic incentives premise of the copyright law and the injustice of permitting one to appropriate the fruit of another's labor.⁶⁸

The coexistence of cases like *Worth* and *National Business Lists* created a sharp conflict among the circuits. Under the creative selection approach, a second compiler was clearly allowed to take advantage of at least some of the first compiler's research. By contrast, the principle of protecting the first compiler's labor destroyed the second compiler's ability to build on the first compiler's work. Instead, courts following this so-called "sweat theory" consistently held that the second compiler had to proceed as if the first compiler's work had never existed. In other words, the second compiler had to gather all of her information from sources other than the first compiler's work. The only permissible use of the first compiler's work was as a device for checking back for errors.⁶⁹ These drastically different results set the stage for *Feist*.

⁶⁸ *National Business Lists*, 552 F. Supp. at 92.

⁶⁹ The clearest recent statement of this position is *Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145, 149 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986):

The right to "check back" does not imply a right to start with the copyrighted work. Everyone must do the same basic work, the same "industrious collection" The second compiler must assemble the material as if there had never been a first compilation; only then may the second compiler use the first as a check on error.

See also *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5-6 (7th Cir. 1977) ("Another is entitled to make his own compilation . . . using information in the public domain, but he is not entitled merely to copy the copyrighted list.").

III. THE *FEIST* DECISION

As mentioned previously, *Feist* involved the copyrightability of telephone directory white pages. The plaintiff and respondent, Rural Telephone Service Company, held a monopoly franchise which permitted it to provide telephone service to a number of communities in northwest Kansas. Pursuant to state law, Rural Telephone produced an annually updated telephone directory which contained a typical white pages section.⁷⁰

The defendant and petitioner, Feist Publications, Inc., was a publishing company that produced area-wide telephone books. The directory at stake in the litigation covered eleven different service areas and contained over 46,000 telephone listings. The area covered by the Feist directory overlapped a portion of the area serviced by Rural Telephone.⁷¹

In preparing its directory, Feist successfully bought permission to use the white pages from ten of the eleven telephone companies whose listings would be duplicated. Only Rural Telephone refused. Undeterred by this refusal, Feist based part of its directory on Rural Telephone's white pages anyway. Feist simply took the desired portion of Rural Telephone's listings and incorporated the information into the Feist directory.⁷² When Rural Telephone discovered the copying, it sued Feist for copyright infringement.⁷³

Feist squarely presented the Court with the very conflict which troubled the circuit courts. If it applied the creative selection principles derived from *Sarony* and *Bleistein*, Rural Telephone would have no effective protection against competitors like Feist who appropriated valuable information. This might well seem damaging to public policy and unfair.⁷⁴ Conversely, if the Court used the

⁷⁰ 111 S. Ct. at 1286.

⁷¹ *Id.*

⁷² *Id.* at 1286-87. According to the Court's opinion, Feist's employees conducted additional research to verify and augment Rural Telephone's listings. Despite this, four entirely fictitious listings created by Rural Telephone were reproduced in the Feist directory. *Id.* at 1287. This certainly suggests shoddy verification by Feist, and raises the possibility that verification was attempted only to put a good face on Feist's wholesale appropriation of information from Rural Telephone's directory.

⁷³ *Id.* at 1287.

⁷⁴ Under the creative selection approach, Rural Telephone's copyright (if it existed at all) would cover only the selection and arrangement of its white pages directory. Rural Telephone's claim would thus rest on two related propositions. First, Rural Telephone selected which customers to portray in its white pages directory. Second, it arranged the customers in alphabetical order.

These propositions, however, lend little support to Rural Telephone's case against Feist. At the outset, Feist could claim that Rural Telephone's listings were not sufficiently creative to warrant copyright protection. After all, the decision to list one's customers is hardly creative. Similarly, the use of alphabetical ordering is so trite that calling it creative

sweat theory, it could extend meaningful protection to Rural Telephone.⁷⁵ Such action would, however, damage the well-established proposition that originality is a prerequisite for copyright protection.⁷⁶

The foregoing suggests the justifications the Court would have to construct for the two general directions in which it could proceed. If the Court decided for the defendant, it would have to square its doctrinal choice with public policy and notions of fairness. If the Court decided for the plaintiff, it would have to explain why it chose to ignore the guidance of its own well-established doctrine. Although opinions could have been written to support either possibility, the Court chose to follow the creative selection approach.

Not surprisingly, the Court began by restating basic doctrines and results. After summarizing facts, the Court set forth the originality requirement.⁷⁷ The Court then applied the originality requirement to statements of fact and concluded that the facts themselves cannot be copyrighted.⁷⁸ Next, the Court used the standard creative selection explanation to conclude that factual

would render the originality standard a nullity. *See supra* note 57 and accompanying text; Ginsburg, *supra* note 2 at 1894 (criticizing decisions which found white pages copyrightable under creative selection approach). Even if these claims were rejected, Feist could still argue that neither its selection of listings nor their arrangement were borrowed from Rural Telephone. Feist would note that it did not reproduce all of Rural Telephone's listings and in fact added additional ones from elsewhere. Moreover, Feist could quite plausibly contend that it borrowed the alphabetical arrangement of its listings from other, public domain directories.

⁷⁵ One might argue that the sweat theory does not extend protection to Rural Telephone because Rural Telephone expended no meaningful effort in assigning and printing the telephone numbers of its customers. Since state law required Rural Telephone to publish its directory, the cost of doing so was presumably built in to the rates Rural Telephone charged its customers. Thus, denying copyright in this case would neither damage the incentives for producing telephone white pages nor deprive Rural Telephone of a fair economic return. This argument, however, had been expressly rejected by the Eighth Circuit. Its application in *Feist* might, therefore, have been problematic. *See Hutchinson Tel. Co. v. Frontier Directory Co.*, 770 F.2d 128 (8th Cir. 1985).

⁷⁶ In this case, application of the sweat theory would prohibit Feist from basing its directory on Rural Telephone's listings. *See supra* notes 58-69 and accompanying text. This would damage the originality requirement because Feist borrowed little which is clearly original.

⁷⁷ 111 S. Ct. at 1287 ("The *sine qua non* of copyright is originality Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.") *Id.*

⁷⁸ *Id.* at 1288 ("No one may claim originality as to facts.' . . . This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.") (citations omitted).

compilations may be copyrighted if they are sufficiently original.⁷⁹ The Court finished its exposition of basics by explaining the consequences of applying the creative selection approach to factual compilations:

This inevitably means that copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.⁸⁰

At this point, the Court had done no more than state well-known doctrines and conclusions consistent with the view taken by a majority of circuit courts. If it had so desired, the Court could have simply gone on to apply the creative selection approach to the case at hand. Simple doctrinal adherence to the requirement of originality could have supported the defendant's victory.

However, the Court did not do this. Apparently, it felt that doctrine alone provided insufficient support to its preference for the creative selection approach. In particular, the Court seemed to find the concerns of sweat theory proponents sufficiently troubling to require rebuttal. The Court, therefore, used the paragraphs which immediately followed its exposition of basic results to explain why the concerns raised by sweat theorists could be ignored.⁸¹

The Court began by recognizing the possible unfairness of failure to protect a compiler's labor. This possibility, however, could be overlooked, for the failure to protect a compiler's labor is "the essence of copyright."⁸² The Court stated that the policy behind copyright was to promote "the Progress of Science and useful Arts."⁸³ By making this assertion, the Court adopted a long tradition which states that copyright is not meant to secure the rights of authors, but only to advance the public welfare. Thus, fairness to compilers was simply not an issue.⁸⁴ As to the possibility that protecting a compiler's labor might be necessary to encourage the desired production of factual compilations, the Court stated that the creative selection approach correctly implemented copyright's policy of encouragement. The Court used this

⁷⁹ *Id.* at 1289 ("Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.").

⁸⁰ *Id.*

⁸¹ *Id.* 1289-90.

⁸² *Id.* at 1289-90. ("It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not 'some unforeseen byproduct of a statutory scheme.' It is, rather, 'the essence of copyright.'") (citations omitted).

⁸³ *Id.* at 1290.

⁸⁴ *See supra* note 15.

reasoning to extend copyright protection only to the creative aspects of factual compilations, and not to the compiler's labor itself.⁸⁵

Having now ostensibly demonstrated the irrelevance of sweat theorists' concerns, the Court proceeded to explain how the sweat theory could not coexist with the superior creative selection approach.⁸⁶ This inconsistency meant that courts which had adopted the sweat theory had simply misunderstood the copyright statute.⁸⁷ The Court underscored this point by recapping the copyright statute's legislative history, which defined the phrase "original works of authorship" by referring to the originality standard.⁸⁸

Having completed its attack on the sweat theory, the Court concluded its opinion by applying the creative selection approach to the case at hand. According to the Court, Rural Telephone's case hinged on whether Feist had copied anything "original" to Rural Telephone.⁸⁹ The Court concluded that Feist had not copied any original material, but it reached that conclusion in an interesting way.

Ordinarily, one would assume that the answer to whether Feist had copied any original material would start with an identification of what Feist had copied. The Court stated that Feist had taken "1,309 names, towns, and telephone numbers" from Rural Telephone's white pages.⁹⁰ Since copyright could extend only to the selection and arrangement of this information, one would expect the Court to proceed by analyzing whether any selection or

⁸⁵ *Id.*:

To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

⁸⁶ *Id.* at 1291-92.

⁸⁷ *Id.* at 1291. The Court stated "But some courts misunderstood the statute," and then cited *Leon* and *Jeweler's Circular*, two cases which supported the sweat theory. The Court later wrote, "Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as 'sweat of the brow' or 'industrious collection,' the underlying notion was that copyright was a reward for the hard work that went into compiling facts." *Id.* In point of fact, the criticism of these cases was not entirely correct, given the then well-established practice of protecting the labor invested in compilation. *See supra* notes 60-61 and accompanying text.

⁸⁸ *Id.* at 1292-95.

⁸⁹ *Id.* at 1296.

⁹⁰ *Id.*

arrangement was borrowed at all.⁹¹ Since, as noted earlier, it seems that Feist had not borrowed Rural Telephone's selection or arrangement,⁹² the Court could then have decided for Feist by finding that no infringement had occurred. This would have been entirely consistent with the Court's earlier statement that "copyright in a factual compilation is thin."⁹³

Surprisingly, the Court did not do this. Instead, the Court apparently assumed that Feist did take Rural Telephone's selection and arrangement,⁹⁴ and reached for the question of whether Rural Telephone's white pages were copyrightable. The Court concluded that they were not.⁹⁵

As to the selection of listings, the Court made two observations. First, the selection was too basic to satisfy the creativity requirement. Although Rural Telephone's decision to list its customers was conceivably a "selection," the selection was so "obvious" that it could hardly be considered creative.⁹⁶ Second, the Court noted that Kansas law required Rural Telephone to publish a directory of its customers. This too made Rural Telephone's selection insufficiently creative.⁹⁷

The Court made similar observations about Rural Telephone's alphabetical arrangement of listings. The Court did recognize that Rural Telephone arguably chose this ordering over other possibilities. Nevertheless, the alphabetical

⁹¹ Feist admitted that the directory as a whole was copyrightable. *Id.* at 1296.

⁹² See *supra* note 74 and accompanying text.

⁹³ 111 S. Ct. at 1289.

⁹⁴ One could plausibly conclude that such an assumption was incorrect. See *supra* note 74 and accompanying text.

⁹⁵ *Id.* at 1296.

⁹⁶ *Id.* The Court's use of the term "obvious" is puzzling. As noted previously, copyright doctrine clearly protects "ordinary works." See *supra* notes 37-42 and accompanying text. By contrast, the term "obvious" brings to mind section 103 of the Patent Code, which states that a patent cannot be obtained

if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been *obvious* at the time the invention was made to a person having *ordinary skill* in the art to which said subject matter pertains.

35 U.S.C. § 103 (1991) (emphasis added). The patent code's apparent denial of protection to ordinary advances raises the possibility that *Feist* changed dramatically the scope of copyrightable subject matter. This possibility should, however, be discounted in light of the *Feist* Court's other statements about copyright's low standard of originality. See 111 S. Ct. 1296 ("The standard of originality is low."). For this reason, it is important for analysts to consciously avoid the conceptual baggage associated with the patent term "obvious" when construing *Feist*. This could perhaps best be done by eschewing the word "obvious" in copyright. Instead, Rural Telephone's selection of listings should be labelled so mechanical that it cannot exhibit the creativity needed to support copyright.

⁹⁷ *Id.* at 1296-97.

ordering of names in white pages was so common that "it is practically inevitable."⁹⁸ Rural Telephone's alphabetical ordering, therefore, displayed too little creativity to support copyright.⁹⁹

IV. COPYRIGHT AND THE ECONOMICS OF PUBLIC GOODS

This Article's analysis of the creative selection approach begins by articulating how copyright promotes "the progress of Science and useful Arts." If copyright did not exist, the production of socially beneficial works might be unprofitable. Individuals who write might find their works copied by others, and perhaps resold at a price cheaper than the author could match. If this occurs, potential authors would find it unprofitable to write, and society would suffer. Copyright prevents others from copying authors' works without permission. Thus, by eliminating authors' competition, copyright makes the production of works profitable. The increased production of works then advances the progress of science and art.

Of course, it must also be recognized that the above described promotion comes at a price. All authors borrow from other works.¹⁰⁰ By prohibiting

⁹⁸ *Id.* at 1297.

⁹⁹ *Id.* An interesting issue worth mentioning is the question of whether producers of unoriginal compilations can find protection outside copyright law. In 1918, the Supreme Court held that state law could prohibit the borrowing of information from uncopyrighted news reports. *International News Serv. v. Associated Press*, 248 U.S. 215 (1918). This result suggests that state law could augment the protection available under federal copyright law. Later developments have, however, cast considerable doubt on this possibility.

In particular, the 1976 revision of the copyright statute contained a provision which expressly pre-empted "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" 17 U.S.C. § 301(a) (1988). Thus, the availability of state law to compilers seeking additional protection now depends on whether courts find such protection "equivalent" to copyright. Not surprisingly, courts and commentators have approached this problem in ways which lead to different results. An analysis of the possibilities is beyond the scope of this Article. This Article, however, will proceed on the assumption that state law cannot substantially increase the protection available to compilers. For analysis of the pre-emption problem, see Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 UCLA L. REV. 1070 (1977); Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107 (1977); Abrams, *Copyright, Misappropriation, and Preemption: Constitutional and Statutory Limits of State Protection*, 1983 SUP. CT. REV. 509; McNamara, *Copyright Protection, Effecting the Analysis Prescribed by Section 301*, 24 B.C.L. REV. 963 (1983).

¹⁰⁰ See *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436):

In truth, in literature, in science and in art, there are, and can be few, if any, things, which, in an abstract sense, are strictly new and original throughout. Everybook in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

borrowing from copyrighted works, copyright makes it harder for authors to produce new works. Those authors must pay to borrow, or they must start from scratch. These obstacles hinder the production of beneficial works, thereby retarding "the progress of Science and useful Arts."

These conflicting results suggest that copyright must strike a balance between giving authors adequate incentives to produce and making available ample material from which future works can be produced. As applied to factual compilations, the creative selection approach arguably does this by extending protection only to creatively arranged compilations while leaving facts in the public domain. Close scrutiny, however, reveals that this balance is not necessarily ideal.

If copyright operates by exchanging incentives to production for impediments to creation, it follows that copyright should maximize the benefits of increased production over the costs of copyright. When this insight is applied to the creative selection approach, the methodology for this section becomes clear. If the creative selection approach is designed to increase benefits gained from factual compilations, then it would seem that the creative selection approach is consistent with promoting "the progress of Science and useful Arts." If the converse is true, however, it would appear that the creative selection approach does little to advance copyright policy, at least in the context of factual compilations. Determining which of these possibilities is true requires a look at the economic principles which describe how copyright works.

A. *The Economics of Public Goods*

Economists generally explain copyright as law which makes possible the private production of public goods.¹⁰¹ This description results from differences in the economic properties of public goods and private goods. Private goods, which make up the bulk of goods studied by economists, have two qualities which are important for the purposes of this discussion. First, private goods exhibit rivalrous consumption. This means that only one person may consume a given unit of a private good. If someone eats an apple, no one else may do so. Second, private goods exhibit excludability. This means that sellers of private goods have the ability to prevent those who do not pay for the good from consuming the good. One generally does not obtain an apple to eat unless one purchases it from a willing seller.¹⁰²

¹⁰¹ See Landes & Posner, *supra* note 15; Breyer, *supra* note 15; Hurt & Schuchman, *supra* note 15; R. COOTER & T. ULEN, LAW AND ECONOMICS 112-16, 139-44 (1988).

¹⁰² S. CALL & W. HOLOHAN, MICROECONOMICS 455-56 (1983); R. COOTER & T. ULEN, *supra* note 101, at 108-09.

By contrast, public goods exhibit nonrivalrous consumption and nonexcludability. To take a common example of a public good, consider a lighthouse.¹⁰³ While only one person may consume an apple, any number of sailors can use a lighthouse to be warned of imminent danger. While the seller of an apple can prevent nonpurchasers from enjoying it, the lighthouse owner has no method of extracting payment from all who benefit from the beacon.¹⁰⁴ Nonrivalrous consumption and nonexcludability have severe consequences for the private supply of public goods.

As the reader is probably aware, a fundamental insight of modern economics is that under perfect conditions, the unrestricted market will induce the optimal production of private goods. Since rational individuals are assumed to behave in a self-interested fashion,¹⁰⁵ they will naturally engage in mutually beneficial transactions until no such transactions remain. Thus, producers will continue to make and sell private goods as long as consumers remain willing to pay an amount greater than the marginal cost of production. As the supply of goods increases, the price will eventually fall to the point at which it equals the marginal cost of production. At this point, producers no longer profit from selling the private good, and they cease additional production. The market has reached an equilibrium of supply and demand for which the marginal cost of production, marginal benefit of consumption, and price are equal.¹⁰⁶ According to economists, this equilibrium represents an efficient, or optimal, allocation of society's resources.¹⁰⁷ Moreover, the tendency of unencumbered markets to produce this equilibrium suggests that the law needs to do relatively little to advance the optimal allocation of society's resources.¹⁰⁸

The market for public goods, however, carries no such presumption of optimality. The problem begins with nonrivalrous consumption. When a consumer buys a private good, her payment finances one unit of production

¹⁰³ See P. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 45, 159 (6th ed. 1964); R. Cooter & T. Ulen, *supra* note 101, at 46.

¹⁰⁴ See A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION* 251-52 (1969).

¹⁰⁵ For economic definitions of and discussion about rational individuals, see H. VARIAN, *MICROECONOMIC ANALYSIS* 80-84 (1978); Georgescu-Roegen, *Choice, Expectations, and Measurability*, 69 Q.J. ECON. 503 (1954); Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309 (1986).

¹⁰⁶ R. COOTER & T. ULEN, *supra* note 101, at 36.

¹⁰⁷ *Id.* at 44-45, 49.

¹⁰⁸ This suggestion is the result of the Coase theorem, which states that in the absence of transaction costs, the assignment of a legal right will not effect the efficient allocation of social resources. As long as transaction costs remain low, the Coase theorem remains relatively unaffected. If transaction costs become high, then governmental action may be necessary to attain an efficient allocation of resources. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (setting forth the so-called "Coase theorem"); A.M. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 11-14 (1989).

which she alone consumes.¹⁰⁹ Payment for a public good, however, finances one unit of production which any number of people can consume.¹¹⁰ This creates an interesting problem, for the possibility of enjoying a public good paid for by others¹¹¹ gives individuals the incentive to avoid purchasing a public good. If a sufficient number of people follow this incentive,¹¹² the public good will never be provided.¹¹³ This so-called "free rider" problem leads to the general statement that markets ordinarily provide a less than optimal supply of public goods.¹¹⁴

The foregoing analysis suggests that government can overcome the problems associated with public goods by subsidizing their production. In some cases, government may finance production from tax revenues. In other cases, government may enact laws which eliminate the benefits of free riding.¹¹⁵ These techniques, however, are not a panacea to the public goods problem.

If government decides to finance production from tax receipts, it encounters the problem of identifying the individuals who should be taxed and the amounts they should pay. Although economic theory suggests that each person should pay a tax equal to the amount she is willing to pay for access to the public good,¹¹⁶ measuring that amount is extremely difficult. Thus, although government will undoubtedly provide some amount of the desired public good, it will probably over or undersupply it.

¹⁰⁹ See *supra* note 101-02 and accompanying text.

¹¹⁰ This is the direct consequence of nonrivalrous consumption. Once a lighthouse has been paid for, an infinite number can "consume" it. See A. ALCHIAN & W. ALLEN, *supra* note 104, at 251-52.

¹¹¹ This is the direct consequence of nonexclusion, for those who paid for the public good will not be able to prevent others from enjoying it. See A. ALCHIAN & W. ALLEN, *supra* note 104, at 251-52.

¹¹² People who follow such an incentive are dubbed "free riders." R. COOTER & T. ULEN, *supra* note 101, at 109.

¹¹³ Suppose that ten boats use a harbor which needs a lighthouse to mark its entrance. Suppose further that a lighthouse could be built for \$10,000, and that each boat owner would reap a total benefit of \$4,000 from the lighthouse's existence. A social cost-benefit analysis clearly dictates that construction should proceed. (Total benefit of \$40,000 (ten boats with benefits of \$4,000 each) less construction costs of \$10,000 = Net benefit of \$30,000). Indeed, it would be rational for any three boat owners to jointly finance construction, for they would each reap benefits of \$667. However, if a given boat owner can avoid paying for the lighthouse, she will enjoy the full benefit of the lighthouse (\$4,000) while paying for none of the cost. By contrast, those who pay for the lighthouse will benefit less, for they must bear their share of construction costs. This dynamic suggests that many boat owners will wait for construction of the lighthouse in hopes that their colleagues will pay for it first. Of course, if no one acts, the lighthouse will never be built, and all will suffer.

¹¹⁴ R. COOTER & T. ULEN, *supra* note 101, at 109.

¹¹⁵ *Id.*, at 46-48.

¹¹⁶ H. VARIAN, *supra* note 105, at 199-200.

An equally difficult problem occurs if government tries to encourage the private production of public goods by eliminating the benefits of free riding, for allowing the producer of public goods to charge everyone who consumes the good is presumptively wasteful. Once production of a public good has been paid for, an infinite number of people can share consumption of the good without harming either the producer or those who financed production. After all, the producer has gained a profit from the first purchasers, who in turn have acquired something of greater value than the amount paid. Since one person's consumption of a public good does not affect consumption by others, expenses (besides distribution costs) incurred by those other than the initial purchasers are unnecessary. It therefore follows that a producer of public goods should ideally be allowed to charge consumers only until costs of production have been met.¹¹⁷ Such government control of sales and prices is, however, generally foreign to our system of private production and sale of goods. Government policy makers who want to encourage private production of public goods are, therefore, likely to find that all of their options are less than perfect.¹¹⁸

The economics of public goods is directly applicable to the production of all intellectual property. In particular, factual compilations often share the characteristics of public goods. First, any number of people can read or otherwise use facts without impairing their use by others. Thus, compilations exhibit nonrivalrous consumption. Second, it is often difficult to prevent those who do not pay compilers from using factual compilations. Easy access to photocopying machines and computer equipment generally allows free riders to inexpensively copy or otherwise reproduce the compilation. Compilations, therefore, show some nonexcludability.¹¹⁹

The public goods nature of factual compilations suggests that their free market supply will often fall short of the ideal. Copyright is clearly one of the tools which could be used to combat this problem by eliminating the benefits of free riding. Indeed, a perfect copyright balance could be struck by allowing producers of compilations to recover their development costs, but no more. Such precision, however, might be unrealistic, so this Article proceeds on the

¹¹⁷ See A. ALCHIAN & W. ALLEN, *supra* note 104, at 251-52; Besen, *New Technologies and Intellectual Property: An Economic Analysis*, The RAND Corp., IST-8415297-NSF at 4 (1987).

¹¹⁸ For additional readings on the private production of public goods, see Demsetz, *The Private Production of Public Goods*, 13 J. L. & ECON. 293 (1970); Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971); Oakland, *Public Goods, Perfect Competition, and Underproduction*, 82 J. POL. ECON. 927 (1974); Novos & Waldman, *The Effects of Increased Copyright Protection, An Analytic Approach*, 92 J. POL. ECON. 236 (1984); Besen & Kirby, *Private Copying, Appropriability, and Optimal Copying Royalties*, The RAND Corp., R-3546-NSF (1987).

¹¹⁹ But see *infra* note 130 and accompanying text.

somewhat relaxed view that copyright works best by protecting only those compilations whose development costs cannot otherwise be recouped.

B. Recouping the Development Costs for Production of Factual Compilations

Conclusions about compilers' ability to recoup development costs start with a consideration of how factual compilations are marketed and distributed. In the basic transaction, the compiler sets a single price and sells copies of the compilation to all willing to pay the price. A cursory look at this situation suggests that the compiler is unlikely to recoup development costs because any purchaser can quickly undercut her in the market. After all, a compiler must price copies high enough to recover development costs plus the costs of producing and distributing the copies.¹²⁰ By contrast, anyone who wants to undercut a compiler need only incur the cost of buying one copy of the work plus the costs of producing and distributing copies. This competitive advantage presumably allows a competitor to price his copies lower than the original compiler, with the result that the original compiler never sells enough copies to recoup her costs. This scenario represents a classic free rider problem which must be remedied if any compilations are to be produced at all. A closer look, however, reveals that things are not as grim as they first seem.

At the outset, it must be mentioned that the sale of information is not the only method by which a compiler recoups development costs. Sometimes compilers release information to spur sales of other goods and services.¹²¹ In other cases, development costs are paid for by nonprofit organizations or government.¹²² For these compilations, the free rider problem is either

¹²⁰ Besen, *supra* note 117, at 11.

¹²¹ Concert halls distribute lists of programs, dates, prices and performers without charge. Similarly, most stores compile and distribute catalogs and distribute them free to potential customers.

¹²² To take a simple example, libraries catalog their collections, and generally provide the public with free access to the resulting compilations. In many cases, libraries cooperate with one another to produce computerized data bases covering the collections of all member libraries. Libraries who join these cooperative, nonprofit networks garner substantial cost savings in developing their own catalogs. Interestingly, these networks are now seeking copyright protection for their compilations. See Brown, *Copyright and Computer Databases: The Case of the Bibliographic Utility*, 11 RUTGERS COMP. & TECH. L.J. 17, 18-19 (1985); Moore, *Ownership of Access Information: Exploring the Application of Copyright Law to Library Catalog Records*, 4 COMP. L.J. 305, 321-29 (1983).

An equally interesting development is emerging in the area of mapmaking. Recently, the United States Government has made available the so-called "TIGER" (Topologically Integrated Geographical Encoding and Referencing System) files. These files represent a digitized street map for the United States. Under law, these files are gratuitously distributed on CD-ROM or magnetic tapes to educational institutions and libraries designated as

eliminated or of diminished importance. Furthermore, even if recoupment depends on the actual sale of information, it does not inevitably follow that copyright is necessary.

If the ratio of sales to development costs is high enough, free rider incentives are effectively eliminated.¹²³ Suppose that a compiler incurs 1,000 dollars in development costs, and that she expects to sell 1,000 copies of the work at a production and distribution cost of one dollar per copy. If our compiler is to recoup her development costs, she must price each copy no lower than two dollars.¹²⁴ If the free rider incurred the same production and distribution costs as the compiler, he could offer the same work for as little as one dollar and one cent per copy.¹²⁵ Thus, a free rider could successfully undercut the compiler's price and appropriate the expected sales. By contrast, consider what would happen if the expected sales for our compiler were 100,000 copies. Now she can spread recoupment of her development costs over an additional 99,000 works. Consequently, she can offer a price as low as one dollar and one cent.¹²⁶ This spreading of recoupment costs makes it impossible for a free rider to appropriate the entire market by greatly diminishing any available cost advantage. Indeed, under these facts a free rider would be forced to offer his competing work at the same price of one dollar and one cent.¹²⁷

Even when free rider incentives remain intact, resourceful compilers may still be able to recoup their development costs. Many of these opportunities involve the exploitation of the natural monopoly which follows first publication. After all, any free riding competitor must purchase an original, set

government depositories. Businesses may purchase them at cost: \$10,000 for CD-ROM and \$87,000 for magnetic tapes. When combined with the appropriate software, the TIGER files greatly speed certain types of mapmaking. Such massive subsidy would obviously decrease the size of development costs. See Larson, *TIGER Opens New Mapping Vistas for Businesses*, AMERICAN DEMOGRAPHICS 16 (June 1990); Fost, *The Next Generation of Computer Mapping*, AMERICAN DEMOGRAPHICS 16 (August 1990).

¹²³ Cf. Breyer, *supra* note 15, at 294-99, 302.

¹²⁴ Since the compiler must recoup \$1,000 over 1,000 copies, she must add \$1 to the distribution cost, for a total price of \$2 per copy.

¹²⁵ The free rider incurs \$2 in "development costs" by purchasing one copy from the original compiler. When added to production and distribution costs of \$1 per copy for 1,000 copies, a total of \$1,002 must be recovered in 1,000 sales. This implies a sale price of $1,002/1,000$, or \$1.002. Since a penny represents the smallest increment of commerce, the price must be rounded to \$1.01.

¹²⁶ Our compiler has \$1,000 in development costs plus a total of \$100,000 in distribution and production costs. When divided over 100,000 sales, a price of \$1.01 results.

¹²⁷ The free rider now incurs \$1.01 in "development costs" by purchasing one copy from the original compiler. When added to production and distribution costs of \$1 per copy for 100,000 copies, a total of \$100,001.01 must be recovered in 100,000 sales. This implies a sale price of $100,001.01/100,000$, or \$1.0000101. Since a penny represents the smallest increment of commerce, the price must be rounded up to \$1.01.

up production, market the competing work, and distribute it. Since the competitor cannot begin this process until after the original has been marketed, the original compiler is guaranteed a period of time during which only she will be selling the work.

This natural monopoly clearly provides compilers a chance to recoup development costs. If the compilation contains information which is time sensitive, these sales will occur at monopoly prices.¹²⁸ Profits earned during this time can certainly be applied against development costs. The amount of recoupment, however, may not be significant unless the length of the monopoly and the revenue earned are sufficiently large. Although the monopoly period may often be so short that no significant recoupment will occur,¹²⁹ it turns out that compilers can occasionally increase significantly both the length and profitability of natural monopolies.

The most obvious way to lengthen the natural monopoly is to discourage potential competitors from entering the market. In some cases, compilers adopt strategies to directly prohibit users from copying data. Facts distributed via computer may be "copy protected,"¹³⁰ and compilers sometimes require promises against copying and disclosure as a condition of access to their works.¹³¹ In other cases, compilers take steps which may not prohibit copying, but simply remove some of its benefits. If facts are disseminated "on-line," charges for copying or downloading cut down or eliminate the profit any

¹²⁸ It goes without saying that a monopolist will, if possible, charge monopoly prices. One might ask, however, why any consumer would pay monopoly prices if free riders are eventually going to drive prices down. The answer lies in circumstances which make information particularly valuable today, but considerably less valuable tomorrow. This is often the case with business, financial and other economic data. In these cases, consumers of information may find paying monopoly prices for immediate access to information preferable to waiting for the price to come down.

¹²⁹ Of course, this depends on the relative costs of copying, marketing, distributing, and the like. For divergent estimates of these items, compare Breyer, *supra* note 15, with Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971) and Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972).

¹³⁰ See Palmer, *supra* note 42, at 288-89.

¹³¹ See *id.* at 291-95. In cases of mass distribution, compilers might try to enforce so-called "shrink-wrap" licenses. These licenses are ordinarily printed on the packaging in which information is distributed, along with the statement that the customer agrees to all the printed terms by opening the package. Not surprisingly, these licenses can prove difficult to enforce. By contrast, agreements reached in face-to-face negotiations may prove less problematic. For analysis of the relevant problems, see Note, *Offers Users Can't Refuse: Shrink-Wrap License Agreements as Enforceable Adhesion Contracts*, 10 CARDOZO L. REV. 2105 (1989); Stern, *Shrink-Wrap Licenses of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?*, 11 RUTGERS COMP. & TECH. L.J. 51 (1985).

competitor might realize.¹³² Similarly, regular printing of updated editions makes copying less desirable because consumers will likely prefer the new edition to the old one even if only a few changes have been made.¹³³

The foregoing discussion shows that compilers will often establish and maintain significant periods during which they enjoy a monopoly in the market. This sets the stage for profit maximizing strategies which can even further increase the likelihood of significant recoupment of development costs. At the very least, compilers who enjoy secure monopolies are likely to charge monopoly prices, thereby raising their profits. Additionally, compilers may solicit advertisements and add the revenue to monopoly profits already being exacted from consumers.¹³⁴ In still other cases, the compiler will be able to charge those listed in the compilation for the privilege of inclusion.¹³⁵ Finally, compilers will try to raise their profits even further through price discrimination.¹³⁶

Price discrimination occurs when a seller is able to charge consumers different prices for the same product. It is considered advantageous for sellers to practice price discrimination because it enables sellers to extract the maximum amount each consumer is willing to pay. By contrast, if a seller must charge the same price to all, extraction of the maximum amount is unlikely because some consumers will buy the good for less than they are willing to pay.¹³⁷

For example, suppose that a compiler wants to distribute a large collection of data. Suppose further that there are two classes of potential buyers. Class A has 100 members with only a passing interest in the data. Its members will only view the data briefly and are, therefore, willing to pay 100 dollars each for access. Class B has ten members, but they have an intense interest in the data and will examine the compilations at some length. Each member of class B is,

¹³² Interestingly, one survey of database producers concluded that most on line providers do not object to downloading for personal use. The same study also claims that "despite their worst fears, downloading has not put any producers out of business." Garman, *Downloading . . . Still a Live Issue?*, ONLINE 15 (July 1986). This suggests that on line data base producers may not be encountering significant difficulty in recouping development costs. For a study of pricing strategies for information, see Hawkins, *In Search of Ideal Information Pricing*, ONLINE 15 (Mar. 1989).

¹³³ Copyright scholars are only too familiar with the Nimmer treatise and its frequent, expensive updates. See also Besen, *supra* note 117, at 29.

¹³⁴ See Besen, *supra* note 117, at 15-18. For example, newspapers raise substantial revenue through advertising.

¹³⁵ Cf. *J.R. O'Dwyer Co. v. Media Mktg. Int'l, Inc.*, 755 F. Supp. 599, 601 (S.D.N.Y. 1991) (compiler able to charge \$25 fee for inclusion in his directory).

¹³⁶ See Besen, *supra* note 117, at 21-23; Palmer, *supra* note 42, at 295-96.

¹³⁷ For a definition and discussion of price discrimination, see S. CALL & W. HOLOHAN, *supra* note 102, at 275-85; J. GOULD & C. FERGUSON, *MICROECONOMIC THEORY* 268-75 (1980).

therefore, willing to pay 500 dollars for access to the data. Finally, assume that the compiler knows of the existence and size of the two classes, but is not able to identify who the members of each class are. If our compiler chooses to follow a basic transaction, he will set the price of copies at 100 dollars. He will, therefore, sell 100 copies to members of class A at 100 dollars each and 10 copies to members of class B at 100 dollars each. Total revenue will equal 11,000 dollars.¹³⁸

From the perspective of the compiler, the problem with this pricing strategy is that the compiler has not exacted the highest revenue possible from his customers. To be sure, his price of 100 dollars has forced class A to pay its maximum amount for the compilation. However, the price has given a surplus of 400 dollars to each member of class B. This surplus could be eliminated if the compiler had some method of measuring customers' demand for the product. If he knew who the members of class B were, he could charge them a higher price.

The foregoing discussion shows why sellers would like to practice price discrimination. Fortunately for compilers, certain methods of distribution or marketing allow varying degrees of price discrimination as long as the compiler does not face a genuinely competitive market.¹³⁹ If, for example, our compiler chose to distribute his data over an on-line system, he would no longer be forced to charge all customers the same price for access. Instead, the compiler might charge customers for the time they spent looking at the data. This would effectively separate those with high demand for the compilation from those with low demand. Moreover, if rates were set properly, it would have the effect of extracting from each customer the full amount she was willing to pay. Similar results may also be possible if the compiler publishes two versions of the work - perhaps a fancy leather bound version for those willing to pay a higher price, and a less expensive version on newsprint.¹⁴⁰

C. The Relationship Between Copyright Policy and Doctrine

The foregoing glance at the economics of public goods provides a backdrop against which to evaluate the relationship between the creative selection approach and "the progress of Science and the useful Arts." Under the analysis already developed, copyright is a useful tool for allowing compilers to recoup their development costs.¹⁴¹ Furthermore, the free rider problem indicates that copyright will often be necessary to ensure the desired

¹³⁸ If he sets the price at \$500, he will only sell 10 copies at that price to members of class B. Total revenue would then fall to \$5,000.

¹³⁹ If competition exists, then the price discriminator's attempt to sell at the higher price will be undercut by a rival willing to accept a lower profit.

¹⁴⁰ See Besen, *supra* note 117, at 21-22.

¹⁴¹ See *supra* note 101-02 and accompanying text.

production of works.¹⁴² Nevertheless, a careful examination of the production and marketing of factual compilations reveals that some compilers will recover their development costs even if copyright is eliminated. Other compilers will simply not care about recoupments.¹⁴³ Universal extension of copyright is, therefore, mistaken, and copyright should be denied to some, but not all, factual compilations.

At a cursory level, the creative selection approach appears consistent with this economic insight. Under *Feist*, it clearly restricts copyright to creative compilations.¹⁴⁴ The creative selection approach might, therefore, stand on the judgment that development costs for creative compilations would not be recouped without the economic incentives copyright provides.

A closer look, however, reveals that such a conclusion would be mistaken, and that the creative selection approach does little to advance copyright's encouragement policy. The compilations which the creative selection approach protects are those which exhibit sufficient creativity in their selection and arrangement of facts. For the proposed assertion about the creative selection approach to be sound, creativity in a compilation's selection and arrangement should reasonably correspond to the absence of significant opportunities for recouping development costs without copyright. This is simply not the case.

According to our earlier analysis, compilers are unlikely to care about recoupment when they have been subsidized by government or when there is no expectation of selling the compilation.¹⁴⁵ Similarly, recoupment is more likely when the ratio of sales to development costs is high, or when the compiler enjoys significant natural monopoly benefits. This in turn depends on the compiler's marketing strategy and the technology available.¹⁴⁶

The weakness in the proposed conclusion should now be apparent. There is simply nothing to suggest that creative selection or arrangement of facts is positively correlated with the absence of government subsidy, nonprofit motives, low development costs, high sales volume, or natural monopolies. All of these conditions are equally as likely to occur for uncreative compilations as they are for creative ones. Thus, there is no particular reason to think that the creative selection approach directs copyright to compilations whose production genuinely requires encouragement. If anything, it would seem that the sweat theory, which the Court rejected, is better related to the need for encouragement because the amount of a compiler's labor bears some relationship to the size of development costs. Significant sweat would imply large development costs, which in turn would suggest that a compiler would

¹⁴² See *supra* notes 101–19 and accompanying text.

¹⁴³ See *supra* notes 120–40 and accompanying text.

¹⁴⁴ See *supra* notes 15, 79, 94–99 and accompanying text.

¹⁴⁵ See *supra* note 122 and accompanying text.

¹⁴⁶ See *supra* notes 123–140 and accompanying text.

face difficulty in recouping those costs.¹⁴⁷ This realization exposes as questionable any assertion that the creative selection approach's application to factual compilations strongly promotes "the progress of Science and useful Arts."

V. CONCLUSION: THE LEGACY OF *FEIST*

Without question, the Supreme Court intended to clarify copyright law with its opinion in *Feist*. Unfortunately, the weak connection between copyright policy and doctrine threatens to make *Feist*'s legacy one of confusion, and not clarification.

Over the short term, the major problem will be uncertainty over how to apply the creative selection approach in light of *Feist*. As a doctrinal matter, it is now clear that creativity is a prerequisite for copyright in factual compilations. Many courts following this guidance will try to duplicate the qualitative, subjective judgment that the *Feist* Court applied to Rural Telephone's white pages listings. These courts will decide copyrightability by making a quasi-esthetic judgment about whether the compiler's selection and arrangement of data was too ordinary or mechanical to be considered "creative." Other courts, however, will find this judgment too hard to duplicate without guidance.¹⁴⁸ These courts will quite plausibly look to the Supreme Court's policy statements for guidance. If they are troubled by their own unguided use of "creativity," they will look for reassurance by interpreting the doctrine to implement the policy of promoting the "progress of Science and useful Arts."

Once this happens, the seeds of confusion are sown. Decisions made under the first approach will reflect judicial selection of compilations which exhibit some sort of esthetic appeal. By contrast, decisions made under the second will, if done properly, reflect judicial selection of compilations whose development costs are difficult to recoup. As shown previously, however, there is no reason to believe that these approaches will identify the same compilations. Indeed, it is quite likely that the production of many creative compilations needs no further encouragement, or that the production of many ordinary compilations requires additional economic incentives. This conflict

¹⁴⁷ This statement should not be construed as an unqualified endorsement of the sweat theory and the results it has been used to justify. To be sure, some version of the sweat theory may be better than the creative selection approach at identifying which compilations might not be produced without copyright protection. It does not necessarily follow, however, that copyright should prohibit others from any benefits derived from a compiler's labor. Questions about what constitutes infringement, as well as what defenses should be available, are quite complicated and beyond the scope of this Article. For an interesting discussion of these issues, see Ginsburg, *supra* note 2.

¹⁴⁸ See *supra* note 13-14 and accompanying text.

will make it difficult, if not impossible, for courts to follow precedent consistently.¹⁴⁹

The foregoing analysis suggests that, at least over the short term, courts can best achieve *Feist's* goal of clarity and stability by resisting the understandable urge to resolve ambiguities in the creative selection approach by means of the policy articulated in *Feist*. Instead, courts should extend copyright to compilations solely on the basis of quasi-esthetic judgments about selection and arrangement, even if this makes judges uncomfortable. Over the long term, however, it is not at all clear that this course of action will be sufficient to bring genuine clarity and stability to copyright's treatment of factual

¹⁴⁹ The phenomenon referred to in the text may already be emerging in lower court applications of *Feist*. Of the three decisions which have construed *Feist*, two appear concerned with the subjective or esthetic quality of the compiler's selection and arrangement. See *Victor Lalli Enters., Inc. v. Big Red Apple, Inc.*, 936 F.2d 671 (2d Cir. 1991) (noting that the format of plaintiff's charts "is a convention: Lalli exercises neither selectivity in what he reports nor creativity in how he reports it."); *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991) (evaluating plaintiff's forms as possibly "entirely typical," "garden-variety," or "obvious.").

By contrast, the remaining decision appears to justify a finding of originality on the ground that the plaintiff's compilation needs to be encouraged. In *Bellsouth Advertising & Publishing Corp. v. Donnelly Information Publishing, Inc.*, 933 F.2d 952 (11th Cir. 1991), the plaintiff Bellsouth sued its competing yellow pages directory publisher Donnelly for copyright infringement. Bellsouth claimed that Donnelly had committed infringement by purchasing the name, address, and telephone numbers of all businesses in Bellsouth's yellow pages and then printing the listings in a competing directory in substantially the same format. *Id.* at 952.

In deciding for Bellsouth, the Eleventh Circuit made some rather questionable findings of creativity in Bellsouth's yellow pages directory. The court noted that Bellsouth had to select the geographic area, closing date and classifications for the directory. *Id.* at 957. These findings are questionable because the *Feist* Court failed to find similar selections sufficiently creative. In particular, the producer of any white pages directory would also have to select geographic area and closing dates, so it is difficult to see how these selections support creativity. Similarly, although some selection of classifications must be made to create a yellow pages directory, the decision to include and compile categories such as lumber, restaurants and automobile dealers seems extremely mechanical.

Not surprisingly, the *Bellsouth* court seemed uneasy about its reasoning. Immediately after stating that the yellow pages were original, the court bolstered its conclusion by writing, "Because the Yellow Pages directory published by [Bellsouth] provides a convenient, unique organization of business listings and advertisements, it merits originality." *Id.* at 958 (emphasis added). By characterizing the yellow pages directory as "convenient" and "unique," the court essentially argued that the yellow pages were economically useful and rare. If this product were not encouraged through copyright, its possible disappearance would deprive the public of something it desired and could not obtain elsewhere. Thus, the yellow pages deserved or "merited" the label of originality. This reasoning clearly appeals to the encouragement policy behind copyright, and it has resulted in a finding of copyright in aspects of a compilation which exhibit little, if any, creativity.

compilations. Sooner or later, someone will ask why copyright doctrine does not serve copyright policy as well as it might. Resolution of this problem will require some hard thinking about copyright law.

One possibility is that society could decide to revise copyright doctrine to implement ideal copyright policy. This would require eliminating the creative selection approach in favor of doctrine which bears a stronger relationship to the economics of public goods.¹⁵⁰ This action, however, might be impossible to take. For one thing, the *Feist* Court stated that creativity was a constitutional prerequisite to copyrightability.¹⁵¹ If noncreative works are to be copyrighted, *Feist* would have to be overruled. This could precipitate a constitutional crisis over the scope of copyright. Even if this problem could be legislatively finessed,¹⁵² it is not at all clear that Congress could avoid the disruptive influence of various interest groups.

Of course, society could also remain committed to the creative selection approach. This, however, would require an explanation of why copyright doctrine does not strike a better copyright balance. Perhaps the creative selection approach is the closest we can come to the ideal. Alternatively, society might recognize that copyright implements values besides "the progress of Science and useful Arts," and that these values account for the difference between copyright doctrine and the ideal copyright balance. Indeed, some have already suggested that copyright reflects natural law theories of property by securing for authors a fair return on their labor.¹⁵³ Others have stated that copyright protects an author's personality or personhood.¹⁵⁴ Still others have explored the relationship between copyright and social construction of "authorship."¹⁵⁵ However, the Supreme Court has been reluctant to embrace these theories.

Finally, society could decide that the suggested reconstruction of copyright doctrine or policy is simply not worth the trouble. Although this choice will undoubtedly seem attractive,¹⁵⁶ its adoption would be a great pity. For all its flaws, copyright has firmly established itself in legal tradition. The Universal

¹⁵⁰ For an interesting approach, see Ginsburg, *supra* note 2.

¹⁵¹ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1288 (1991).

¹⁵² One possibility would be the enactment of legislation under the Commerce Clause. However, if one accepts this rather transparent solution to the problem mentioned in the text, one must also wonder why the Supreme Court chose to make the scope of copyright a constitutional issue at all. Unless one is serious about forever denying copyright (or similar) protection to ordinary compilations, it would seem that the constitutional limitation articulated in *Feist* should be considered window dressing.

¹⁵³ See Yen, *supra* note 15; Kauffman, *supra* note 15.

¹⁵⁴ See Hughes, *supra* note 15.

¹⁵⁵ See Jaszi, *supra* note 15.

¹⁵⁶ A prime example is the present copyright statute, in which Congress simply adopted existing law as the definition of copyrightable subject matter. See *supra* note 18.

Declaration of Human Rights guarantees rights akin to copyright.¹⁵⁷ As of this writing, no fewer than 109 countries were signatories to the two major copyright treaties.¹⁵⁸ Such widespread adoption of copyright certainly suggests that copyright reflects sincerely held human values. Those values are complex, and they often mix in a pattern which courts and commentators find confusing.¹⁵⁹ These problems, however, are no reason to abandon the effort to understand why we have copyright and how it works. If questions raised by *Feist* force us to continue this effort, then so much the better. Indeed, such a result could guarantee the legacy of *Feist* as one of genuine understanding.

¹⁵⁷ Article 27 provides: "(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Universal Declaration of Human Rights, Article 27 (quoted in S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 5 (1983)).

¹⁵⁸ As of this writing, 85 countries have adhered to the Berne Convention, and 83 to the Universal Copyright Convention. Of these, 59 are parties to both treaties, 26 have joined only the Berne Convention, and 24 have joined only the Universal Copyright Convention. M. BOWMAN & D. HARRIS, MULTILATERAL TREATIES, INDEX AND CURRENT STATUS 9-10, 181-82 (1984); M. BOWMAN & D. HARRIS, MULTILATERAL TREATIES, INDEX AND CURRENT STATUS 71, 96 (Supp. 1990); Of the countries which have not joined either treaty, the most notable is the People's Republic of China, which recently adopted a new copyright law. See Zhao, East Asian Executive Reports, China, vol. 12, p. 9. (Oct. 15, 1990). News reports suggest that China will soon join the Berne Convention. Agence France Presse, June 12, 1991 and June 15, 1991 (NEXIS, International file).

¹⁵⁹ See *supra* note 15.